Local 1235, International Longshoreman's Association, AFL–CIO *and* Metal Management Northeast, Inc./Naporano Iron & Metal Company and Waste Material Recycling and General Industrial Laborers Local 108, LIUNA, Party in Interest/Intervenor.

Waste Material Recycling and General Industrial Laborers Local 108, LIUNA *and* Metal Management Northeast, Inc./Naporano Iron & Metal Company and Local 1235, International Longshoreman's Association, AFL–CIO, Party in Interest/Intervenor. Cases 22–CD–128447 and 22–CD–132070

April 29, 2015

DECISION AND DETERMINATION OF DISPUTE

BY MEMBERS HIROZAWA, JOHNSON, AND MCFERRAN

This is a jurisdictional dispute proceeding under Section 10(k) of the National Labor Relations Act. Metal Management Northeast, Inc./Naporano Iron & Metal Company (the Employer) filed a charge on May 12, 2014, alleging that Local 1235, International Longshoreman's Association, AFL–CIO (Local 1235) violated Section 8(b)(4)(D) of the Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to employees represented by Waste Material Recycling and General Industrial Laborers Local 108, LIUNA (Local 108). The Employer also filed a charge on July 3, 2014, alleging that Local 108 violated Section 8(b)(4)(D) of the Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to employees represented by Local 1235. A hearing was held on July 1–3, 2014, before Hearing Officer Nancy Slahetka. Thereafter, the Employer, Local 1235, and Local 108 filed posthearing briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The Employer, a Delaware corporation, engaged in the business of waste and metal recycling, and Local 108 stipulated that, during the preceding 12 months, the Employer sold and shipped from its Newark, New Jersey facility goods valued in excess of $50,000 directly to points outside the State of New Jersey, and during the same period of time that the Employer purchased and received at its Newark, New Jersey facility, goods and supplies valued in excess of $50,000 directly from enterprises located outside of the State of New Jersey. The Employer and Local 108 further stipulated, and we find based on the record, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.[1] The Employer, Local 1235, and Local 108 stipulated, and we find, that Local 1235 and Local 108 are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of the Dispute

The Employer, located at 182 Calcutta Street, Newark, New Jersey, ships and sells bulk and scrap metal products. Ships being serviced by the Employer dock at berths 30 and 32 in Port Newark. (All three locations are collectively referred to herein as the Employer's facility.) The Employer's employees load and unload products from ships in Port Newark.

The Employer was acquired by Metal Management Northeast in 1998 or 1999. Metal Management Northeast was then acquired by Sims Metal Management USA in 2008. Local 108 and its predecessor, Laborers Local 734 (Local 734), have represented the production, stevedoring, and maintenance employees at the Employer's facility since the early 1990s. Local 108 took over representation of the unit from Local 734 in 2004, when Local 734 was dissolved by the Laborers International Union of North America. The current collective-bargaining agreement between Local 108 and the Employer is effective from May 26, 2012, through May 25, 2018. Local 108 members currently perform both yard and stevedoring work for the Employer.[2]

[1] Local 1235 declined to join the stipulations regarding the Employer's jurisdiction, asserting that there is no evidence that the Employer continues to operate a facility in Port Newark and that it therefore does not purchase or receive cargo at that location in any amount.

[2] A 1993 impartial umpire decision resolving an AFL–CIO art. XX, sec. 3 proceeding provides earlier history of the work in dispute. Until that time, the Employer contracted stevedoring companies to load and unload ships. The Operating Engineers represented the crane operators employed by those companies, and the stevedores were represented by Local 1235. In June 1991, the Operating Engineers went on strike, and it appears that Local 1235 honored the strike. After the strike ended, the Employer decided to perform the loading and unloading work itself, and it assigned that work to its existing yardmen, who were represented by Local 734. Local 1235 picketed, and Local 734 threatened to honor the picket line. As a result, the Employer filed an 8(b)(4)(D) charge, but it was dismissed after Local 734 disclaimed interest in the work. Despite this disclaimer, however, Local 734 members continued to per-

Sims Metal East (SME), located at the Claremont facility in Jersey City, New Jersey, also ships and sells bulk and scrap metal products. In addition, it processes scrap metals. Like the Employer, SME is wholly owned by Sims Metal Management USA. SME is a member of the New York Shipping Association (NYSA), a multiemployer association, and a signatory to a collective-bargaining agreement between NYSA and the International Longshoreman's Association (ILA). The current contract between NYSA and ILA is effective from October 1, 2012, through September 30, 2018. The Employer is not a party to that contract. Local 1235 members currently perform the stevedoring work for SME at its Claremont facility.

Although the operations of SME and Naporano are separate, ships carrying scrap metal often are "topped off" at the Naporano facility after being initially loaded at the SME facility. The loading and unloading at SME is performed by Local 1235 members, and the loading and unloading at the Naporano facility is performed by Local 108 members.

Between September 2013 and June 2014, Local 1235 filed 41 grievances with NYSA, alleging that SME had used non-ILA labor to perform work at the Naporano Port Newark facility, in violation of the ILA-NYSA contract. A meeting was held on May 2, 2014, to discuss the existing grievances. Attendees at this meeting included: Local 1235 President Richard Suarez, Local 1235 members Michael Pallay and Matthew Pallay, and Attorney Elizabeth Alexander for the ILA; Regional Director of Human Resources for Sims Metal Management Edwin Melendez and Attorney Frank Birchfield for SME; and NYSA Director of Labor Operations Ken Karahuta and NYSA Attorney Richard Ciampi. Melendez testified that, during this meeting, Suarez threatened to picket the Port Newark facility "if we continued to bring in bulk metals into the operation," and would bring down the full force of the ILA. Birchfield testified that there was extensive discussion regarding the different types of cargo and that Suarez looked at Melendez and Birchfield and said, "[I]f a ship comes in there to be unloaded and Local 108 does the unloading, we will picket you. I will bring the full weight of the ILA down on you. I will put longshoremen outside that gate and we will shut down the facility." Suarez denied stating that he would take any action against Naporano or SME. The Pallays, Alexander, and Karahuta all testified that they did not hear Suarez make threats to picket or strike during the meeting.[3]

After learning of Local 1253's grievances, Local 108 grew concerned about its potential loss of work. By letter to Melendez, dated May 8, 2014, Local 108 Business Manager Mike Hellstrom wrote:

> In short, Local 108 will exercise any and all rights it maintains to oppose efforts by Sims, if any, to modify the terms and conditions of employment or represented status of the Local 108 bargaining unit members performing the (baselessly) disputed work. . . . Rather, were Sims to in fact—after all these years—ever unilaterally retract its recognition of Local 108 as the bargaining representative of these employees, Local 108 would view such action as a fundamental rupture of the collective bargaining relationship, entitling it to take legal action up to and including striking to defend its long-held bargaining status.

B. Work in Dispute

The notice of hearing described the disputed work as "stevedoring work, defined as the loading and unloading of bulk and break bulk cargoes onto and off waterborne vessels, and the tying-up and letting-go of ships at the facility located at 182 Calcutta Street, Port Newark Terminal, Newark, New Jersey." At the hearing, the Employer, Local 1235, and Local 108 stipulated that this description was accurate.

We find, based on the record, that the work in dispute is stevedoring work, defined as the loading and unloading of bulk and break bulk cargoes onto and off waterborne vessels, and the tying-up and letting-go of ships at the facility located at 182 Calcutta Street, Port Newark Terminal, Newark, New Jersey.

C. Contentions of the Parties

The Employer and Local 108 contend that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated by both Local 1235 and Local 108. During the May 2, 2014 meeting, Suarez threatened to strike or picket if the stevedoring work at the Naporano facility was not given to Local 1235. Local 108 Representative Hellstrom then sent a letter to Melendez threatening action if the same work was reassigned to Local 1235. Both parties assert that these threats are evidence of

form the stevedoring work, causing the International Longshoreman's Association to file a charge with the AFL–CIO alleging a violation of art. XX, sec. 3. The impartial umpire found that there was no violation, and there is no evidence that this decision was appealed.

[3] The NYSA-ILA Labor Relations Committee (LRC) issued a Report and Award dated June 30, 2014, finding that SME and Naporano are a single employer and that SME had violated the contract by using non-ILA labor at the Naporano facility. The remedy awarded included paying damages of lost wages to Local 1235 members. Neither Naporano nor Local 108 participated in any of the proceedings leading up to that award.

competing claims to the work in dispute, as are the grievances filed by Local 1235 with NYSA regarding this work. The Employer and Local 108 contend that the work in dispute should be awarded to Local 108 based on the factors of employer preference and past practice, the collective-bargaining agreements, and economy and efficiency of operations. Local 108 additionally asserts that relative skills and training favors it maintaining the disputed work. The Employer further contends that the 1993 AFL–CIO work jurisdiction decision also weighs in favor of awarding the disputed work to employees represented by Local 108.

Local 1235 contends that the notice of hearing should be quashed because this is not a legitimate case involving competing claims between two unions for the same work within the scope of Sections 8(b)(4)(D) and 10(k). Instead, Local 1235 claims that this is a contractual and work preservation dispute. In support of its contract dispute theory, Local 1235 asserts that SME and the Employer are a single employer and that, therefore, the Employer is contractually bound under the ILA's contract with SME, a signatory member of the NYSA. It also asserts that Suarez did not make any threats during the May 2, 2014 meeting and that Local 108's threat was a sham, made in collusion with the Employer for the purpose of having the issue heard and determined by the NLRB in a 10(k) proceeding.

D. Applicability of the Statute

The Board may proceed with a determination of a dispute under Section 10(k) of the Act only if there is reasonable cause to believe that Section 8(b)(4)(D) has been violated. *Operating Engineers Local 150 (R&D Thiel)*, 345 NLRB 1137, 1139 (2005). This standard requires finding that there is reasonable cause to believe that there are competing claims for the disputed work between rival groups of employees, and that a party has used proscribed means to enforce its claim to that work. Additionally, there must be a finding that the parties have not agreed on a method of voluntary adjustment of the dispute. Id. On this record, we find that these requirements have been met.

1. Competing claims for work

We find reasonable cause to believe that Local 1235 and Local 108 have claimed the work in dispute for the employees they respectively represent. Local 108-represented employees' performance of the disputed work indicates their claim to it. *Laborers Local 310 (KMU Trucking & Excavating)*, 361 NLRB No. 37, slip op. at 3 (2014). In addition, Local 108's threat to take legal action if the Employer reassigned the disputed work to employees not represented by Local 108 also constituted a claim to the work in dispute. Id.

Despite its contention that there are no competing claims to the work, Local 1235 claimed the disputed work by filing the grievances against SME. *Operating Engineers Local 18 (Donley's, Inc.) (Donley's II)*, 360 NLRB No. 113, slip op. at 4 (2014) (citing *Laborers Local 265 (AMS Construction)*, 356 NLRB No. 57, slip op. at 3 (2010)) (pay-in-lieu grievances alleging contractual breaches in the assignment of work constitute demands for the disputed work); see also *Roofers Local 30 v. NLRB*, 1 F.3d 1419, 1427 (3d Cir. 1993) (attempted distinction "between seeking the work and seeking pay for the work is ephemeral"). Additionally, to resolve these grievances, representatives from Local 1235 met with NSE and NYSA representatives to discuss whether the work in dispute should be assigned to Local 1235- represented employees, further evidencing Local 1235's claim to the disputed work.

Moreover, we find no merit in Local 1235's contention that the grievance constitutes a work preservation claim. The record shows that the Employer has assigned essentially all of the stevedoring work at the Naporano facility to Local 108-represented employees for nearly 25 years. Where, as here, a labor organization is claiming work that has not previously been performed by employees it represents, the "objective is not work preservation, but work acquisition," and the Board will resolve the dispute through a 10(k) proceeding. *Electrical Workers Local 48 (Kinder Morgan Terminals)*, 357 NLRB No. 182, slip op. at 3 (2011), and cases cited therein.

Finally, Local 1235 failed to prove its theory that SME and the Employer are a single employer. Rather, the evidence shows that SME and the Employer are two separate entities that are wholly owned subsidiaries of the same company, and that they have the same representation regarding labor issues.

2. Use of proscribed means

We find reasonable cause to believe that both Local 1235 and Local 108 used means proscribed by Section 8(b)(4)(D) to enforce their claims to the work in dispute. At the May 2, 2014 meeting, the Local 1235 representative told representatives of SME, Sims Metal Management USA, and the Employer that if the disputed work was performed by Local 108, Local 1235 would picket, bring the "full weight of the ILA down," and shut down the Employer's facility.[4] In its May 8, 2014 letter, Local

[4] The fact that Local 1235 denies making these threats is inconsequential to the reasonable cause determinations. The Board need not rule on the credibility of testimony in order to determine the dispute, because the Board need only find reasonable cause to believe that Local

108 threatened to "take legal action up to and including striking, to defend its long-held bargaining status." These statements constitute proscribed means to enforce a claim to disputed work. *KMU Trucking & Excavating,* 361 NLRB No. 37 slip. op. at 3; *Operating Engineers Local 150 (Patten Industries)*, 348 NLRB 672, 674 (2006); *R&D Thiel*, 345 NLRB at 1140.

We find no merit in Local 1235's contention that Local 108's threat was not genuine or was the result of collusion with the Employer. The Board has consistently rejected such arguments, absent "affirmative evidence that a threat to take proscribed action was a sham or was the product of collusion." *R&D Thiel*, 345 NLRB at 1140. The record here contains no evidence that supports Local 1235's contention that the Employer colluded with Local 108 to fashion a sham jurisdictional dispute.

3. No voluntary method for adjustment of dispute

We further find no agreed-upon method for voluntary adjustment of the dispute to which all parties are bound. The Employer, Local 1235, and Local 108 so stipulated at the hearing. Although Local 1235 contends that all parties are bound to the agreement between the NYSA and the ILA, the Employer is not a party to this agreement.

Based on the foregoing, we find that there are competing claims for the work in dispute, that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated, and that there is no agreed-upon method for voluntary adjustment of the dispute. We accordingly find that the dispute is properly before the Board for determination.

E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers Local 1212 (Columbia Broadcasting)*, 364 U.S. 573, 577–579 (1961). The Board's determination in a jurisdictional dispute is "an act of judgment based on common sense and experience," reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402, 1410–1411 (1962).

The following factors are relevant in making the determination of this dispute.

1. Employer preference and past practice

The Employer's representatives testified that the Employer prefers to use Local 108-represented employees to perform the stevedore work at the Employer's facility, that it currently assigns this work to Local 108-represented employees, and that it has assigned this work to Local 108-represented employees since 2004. This was undisputed during the hearing. The Employer's representatives further clarified that Local 734, Local 108's predecessor, performed the disputed work since around 1991, when the Employer first started using its own employees for stevedoring, rather than contracting out the work. Therefore, since the early 1990s, only employees represented by the Laborers Union have performed the work in dispute. Furthermore, Local 1235 members have never been employees of the Employer; they performed work at the Employer's facility only as employees of the contractors performing work for the Employer prior to 1991.

We therefore find that this factor favors an award of the work in dispute to employees represented by Local 108.

2. Certifications and collective-bargaining agreements

Employees represented by Local 108 and its predecessor local have been performing the work in dispute for almost 25 years. While represented by Local 108, they performed the work under three consecutive collective-bargaining agreements dating back to 2004. Before that, the employees were represented by the now-defunct Local 734 and performed the work under the Local 734 contracts beginning in the early 1990s. The Recognition Clause of the current collective-bargaining agreement between Local 108 and the Employer recognizes Local 108 as the exclusive representative for all of its stevedoring and maintenance employees. Stevedoring work is further defined, in the Recognition Clause, as "work involved in the loading and unloading of bulk and break bulk cargoes onto and off waterborne vessels, within the classifications of this agreement, consistent with the kind and types of work done by bargaining unit employees prior to May, 2000." The collective-bargaining agreement clearly covers the work in dispute.

Local 1235 contends that its NYSA bargaining agreement applies to the work in dispute. As noted above, SME is signatory to the multiemployer NYSA agreement with the ILA. But the Employer and parent company, Sims Metal Management USA, are neither NYSA members nor signatories to its agreements.

We find that this factor favors an award of the work in dispute to Local 108-represented employees.

3. Economy and efficiency of operations

Several representatives of the Employer testified that it was more efficient and economical for the Employer to assign the stevedore work at its facility to Local 108. Melendez testified that operations would be less efficient if the work were awarded to Local 1235 because, rather

1235 and Local 108 violated the statute to proceed under Sec. 10(k). *R&D Thiel*, 345 NLRB at 1139 and fn.9.

than having one bargaining unit perform all of the work, the work would be split between two bargaining units from two unions. He added that assigning the disputed work to Local 1235 would result in layoffs to employees represented by Local 108, due to costs. Director of Operations Michael Henderson testified that if Local 1235 members were to perform the work in dispute, the Employer would be less competitive in the market due to the increased cost of ILA labor. Operations Manager Scott Krentel similarly testified that labor costs would increase if the work were assigned to Local 1235 members. Krentel further testified that the ILA's requirement that its members work 1 hour and then take the next hour off would affect productivity negatively.

Based on the above, we find that this factor favors an award to employees represented by Local 108.

4. Relative skills and training

Testimony from several witnesses establishes that the employees represented by Local 108 perform the stevedore work at the Employer's facility and that SME Local 1235-represented employees perform the same type of work at the Claremont facility. The work at both facilities requires similar skills, and there was no testimony regarding requisite training for the stevedore work at either company, with the exception of very limited testimony that two stevedore crane operators and one hatch trimmer, employed by SME, and represented by Local 1235, were used by the Employer on very few occasions, because of their extensive training with those particular machines.

Local 108 contends that through its long history of actually performing the work at the Employer's facility, the employees that it represents have developed skills and abilities unique to the Employer's operation. It argues that this long-term experience favors them continuing to perform the work in dispute.

We find that this factor does not favor an award of the disputed work to either group of employees.

5. AFL–CIO jurisdictional award

The Employer urges the Board to give the proper weight to the AFL–CIO's prior jurisdictional determination concerning the identical work in dispute and essentially the same parties. In 1993, upon charges filed by the ILA against the Laborers' Union, the AFL–CIO awarded the disputed work to Local 734; Local 108 is the direct successor-in-interest to Local 734 with regard to the relevant bargaining unit. The Employer relied on this AFL–CIO decision in its collective-bargaining relationship with the Laborers' Union over the next two decades.

Based on the foregoing, we find that the prior jurisdictional determination favors an award to Local 108-represented employees.

III. CONCLUSION

After considering all of the relevant factors, we conclude that employees represented by Local 108 are entitled to perform the work in dispute. We reach this conclusion based on the factors of employer preference and past practice, collective-bargaining agreements, economy and efficiency of operations, and the prior AFL–CIO award over the same work in dispute. In making this determination, we award the work to employees represented by Local 108, not to that labor organization or its members.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

Employees of Metal Management Northeast, Inc./Naporano Iron & Metal Company, who are represented by Waste Material Recycling and General Industrial Laborers Local 108, LIUNA, are entitled to do the stevedoring work, defined as the loading and unloading of bulk and break bulk cargoes onto and off waterborne vessels, and the tying-up and letting-go of ships at the facility located at 182 Calcutta Street, Port Newark Terminal, Newark, New Jersey.

Dated, Washington, D.C. April 29, 2015

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Kent Y. Hirozawa, Member

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Harry I. Johnson, III, Member

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Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD